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No. 04-8990

IN THE

Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INNOCENCE PROJECT, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and criminal justice resource center. Founded by Prof. Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has to date exonerated over 155 innocent persons by post-conviction DNA testing and served as counsel in the majority of these cases. Currently, we represent over 100 clients seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. As perhaps the nation's leading authority on DNA evidence and wrongful convictions, the Project's founders (both of whom are members of New York State's Commission on Forensic Science, charged with regulating all state and local crime laboratories) and its staff are regularly consulted on such issues by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner's constitutional claims in a number of critical respects.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were "extremely rare." *Schlup v. Delo,* 513 U.S. 298,

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[*] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as "nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"[1] – has since freed dozens of citizens from our nation's prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials' acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less "rare" than anyone – including advocates for the innocent – ever imagined.

Yet the DNA "revolution" has done more than reveal that our nation has, with troubling frequency, sent innocent individuals to prison and death row. It has also exposed grievous flaws and shortcomings of various "old" methods of forensic science, ones that directly caused many of these wrongful convictions.[2] This fact – and the lower courts' need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis – makes Petitioner's case a critical one for this Court's review.

Specifically, DNA has revealed a finite but troubling class of convictions tainted by what is best described as "false facts": forensic evidence that likely carried great weight with the original jury, but which is now known, to a scientific certainty, to have been erroneous. Most commonly – as in Petitioner's case – such "false facts" are revealed by DNA tests proving that the defendant was not, in fact, the

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[1] "U.S. Targets DNA Backlog," CHICAGO TRIBUNE., Aug. 2, 2001.

[2] For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved erroneous microscopic hair "matches" at the original trials. *See* Barry Scheck, Peter Neufeld, and Jim Dwyer., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 365 (New American Library ed., Dec. 2003).

source of critical biological evidence recovered from the crime scene, despite trial testimony to the contrary. In the instant case, the jury was told by an expert witness for the prosecution that the defendant was "definitely" a potential donor of semen on the victim's clothing, because he shared the perpetrator's distinct blood type and "secretor status"– yet DNA has now definitively excluded him as the source. Because these "false fact" discoveries involve unassailable science that would be, with good reason, enormously persuasive to a jury on retrial, they cast the *Schlup* inquiry (into whether "reasonable jurors" would likely find a reasonable doubt about guilt) in an entirely new light. Indeed, because of the public's widespread acceptance of DNA evidence, and its inherent objectivity and precision, the very considerations that usually counsel against permitting habeas petitioners to raise post-conviction challenges to their convictions – such as finality, and the need for public confidence in the outcomes of criminal cases – strongly work in favor of relief in this context.

The *en banc* majority in *House* failed to perceive this critical distinction, and its legal significance under this Court's precedents. In denying relief, it crafted a new rule which – if allowed to stand – could jeopardize the legitimate claims of a significant number of innocent persons in prison and on death row. That error requires this Court's correction – particularly because, in this case, some of the scientific "facts" presented to the jury were not just false, but fraudulent (*see* Point III, *infra*). And fortunately, because most State officials grasp the probative value of DNA evidence (and grant relief accordingly), this Court can do so without unduly burdening the federal habeas courts.

REASONS FOR GRANTING THE PETITION

I. A Newly Emerging Class of Post-Conviction Cases – in Which DNA Objectively Proves the Falsity of Critical "Facts" Relied Upon By the Jury at Trial

– Merit Heightened Significance in the *Schlup v. Delo* Analysis, and the *En Banc* Majority Failed to Recognize this Distinction

As persuasively demonstrated in Petitioner's *certiorari* petition, the Circuits are markedly divided on whether a convicted person can pass through the *Schlup* "gateway" if he does not negate each and every item of evidence offered against him at the original trial, no matter how persuasive his new evidence of actual innocence. When courts impose such a burden, they create a substantial risk that an innocent person may be executed, and that error – combined with the impressive evidentiary showing of actual innocence by this particular Petitioner – is reason enough to grant the Writ.

But this case crystallizes another recurring issue that has divided courts facing *Schlup* claims: Is there something about the nature of new scientific evidence of innocence – which definitively disproves material facts offered by the State at trial – that is of distinct importance in the *Schlup* inquiry? Put another way, should objective, scientific proof that a conviction was obtained by reliance on "false facts" be entitled to heightened significance over non-scientific evidence (*i.e.*, recantations by lay witnesses) in deciding whether "it is more likely than not that no reasonable juror would have convicted" had the truth been known?

The answer is a resounding "yes." The reasons go to the heart of *Schlup*'s equitable doctrine, as well as the administration-of-justice concerns shared by both the majority and dissenters in that landmark case. Since DNA testing is increasingly becoming the basis for meritorious claims of actual innocence – to an extent scarcely imagined when *Schlup* itself was decided – the time has come for this Court to squarely address its significance.

A. Public Confidence in the Outcome

Schlup's "gateway" is rooted in the equitable nature of

the habeas writ. *See id.* at 319. In providing a limited forum for a habeas petitioner with strong evidence of actual innocence to adjudicate otherwise-untimely claims of constitutional error, the *Schlup* Court balanced the constitutional imperative against execution of the innocent (the "fundamental miscarriage of justice exception") against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. Two years earlier, those same concerns led to the denial of relief in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993), in which the Court rejected the merits of the petitioner's "freestanding" actual innocence claim, while assuming that "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Id.* at 417.[3]

What tipped the equitable scales in *Schlup* – and renders it consistent with *Herrera* – was the principle that constitutional error at trial, coupled with a strong showing of innocence, so undermined "confidence in the outcome" as to merit less deference on habeas review. *Id.* at 315, 317. That principle also guided the Court in its selection of the standard to govern "gateway" claims. *Id.* at 325 ("a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict) (internal citation omitted). To that end, the *Schlup* test imposes "less of a burden" on petitioners than would be required for a *Herrera* claim of innocence arising from an "error-free" trial. *Id.* at 315-16.

Scientifically proven "false facts" should be governed by the same principle. For while the error here is evidentiary, rather than "legal," the potentially devastating impact on public confidence in the system if the error goes uncorrected

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[3] Six Justices in *Herrera* went further, holding that truly persuasive "freestanding" innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 870 (O'Connor and Kennedy, J.J.); *id.* at 430 (White, J.); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

is arguably greater – particularly when the same new evidence that exposes the falsity supports a viable claim of innocence. Jurors are known to give less weight than lawyers to perceived legal "technicalities," but are more troubled when false scientific evidence may have tainted a conviction.[4] It is thus hard to imagine that the public would not find scientific "false fact" cases to fall within that "narrow class . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 315 (internal citation omitted).

Further support for the proposition that such claims deserve special recognition under *Schlup* can be found in this Court's precedents concerning the use of fabricated evidence in criminal trials. This Court has long held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois,* 360 U.S. 264, 269 (1959)(citing *Mooney v. Holohan*, 294 U.S. 103 (1935). Proof of fabrication requires that the conviction be set aside unless the error was truly harmless, *i.e.*, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103 (1976). That is an even more exacting standard than applies when State officials deliberately withhold exculpatory information from the defense. *See, e.g., United States v. Bagley*, 473 U.S. 677, 682 (1985) (reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different"). Thus, while both claims involve intentional

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[4] *See, e.g.*, "Juror says scientist influenced Moon case rape verdict," EL PASO TIMES, Dec. 23, 2004 (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that serology evidence at trial was "the majority" of what led jury to convict, as it was "what placed [Moon] at the scene more than anything else."); "Convicted Killer Seeks DNA Evidence to Argue His Innocence," AUSTIN AMERICAN STATESMAN, Feb. 11, 2005 (in wake of new evidence that Medical Examiner's assessment in 1986 murder case was flawed and DNA could establish innocence, three jurors reported "that [the M.E.'s] estimation of time of death was a key factor in their decision to convict").

misconduct on the part of State actors, the difference in the two standards makes clear that there is something particularly offensive about allowing convictions predicated on false evidence to stand uncorrected – because the public cannot (and would not) tolerate it.

The impact of objective, scientifically proven "false facts" on public confidence in the outcome of a criminal trial was not before the Court in *Schlup* or *Herrera*, nor has the Court addressed it in the intervening decade. But given the extent to which remarkable advances in DNA technology have already transformed the justice system, and will continue to do so, Petitioner's claim is timely indeed.

B. Impact on Other "Inculpatory" Evidence

Objective, scientifically proven "false facts" invariably do more than invalidate "old" forensic testimony relied upon by the jury. They also transform how a jury would evaluate the entirety of the prosecution's case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is sometimes described as the "simplest" of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active (*i.e*, all parties agree that semen from the victim's body came from the rapist). In-court identification testimony by the victim at trial ("I'm positive he's the one who raped me") is well known to have an enormous impact on juries – and, in the pre-DNA era, it was often "confirmed" by serological analysis of the blood type of the rapist's semen. Yet over 75% of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim's eyewitness testimony at the original trial. In such cases, DNA tests showing that the defendant could not possibly have been the source of the semen immediately cast the once-"certain" identification in an entirely new light. It does not "erase" the victim's original testimony, of course, but eviscerates its

persuasive force, by providing scientific proof that the victim was honestly, but tragically, mistaken.

For a prime example, one need look no further than a case which had earlier reached this Court's own docket: *Arizona v. Youngblood*, 481 U.S. 51 (1989). In *Youngblood*, this Court held that, absent proof of bad faith, the Due Process Clause was not violated by a State's failure to preserve potentially exculpatory evidence in its custody – in that case, semen-stained clothing from the sexual assault of a child. In denying relief, one member of this Court took pains to note that Mr. Youngblood was unlikely to have been prejudiced by the evidence destruction, given what appeared to be "overwhelming" evidence of his guilt at trial. *Id.* at 60 (Stevens, J., concurring in the judgment). That evidence included the fact that the child victim who identified Youngblood in lineup had spent a full one-and-a-half hours in the perpetrator's presence, in broad daylight. He had also described the rapist as a black man with a defective right eye – a telling link to Youngblood's own "bad eye." *See State v. Youngblood*, 790 P.2d 759, 761 (Ariz.App.1989). The fact that Youngblood's defect was in his left eye, not his right, was seen as but a minor discrepancy in an otherwise solid identification. But when a cotton swab was located and DNA tested a decade later, the results squarely proved Youngblood's innocence – and ultimately identified the real perpetrator, a pedophile who was, in fact, missing his right eye.[5] Viewed in light of the DNA evidence, then, the in-court identification that had seemed so powerful at the time of trial was shown to be utterly mistaken and erroneous.

The power of "false facts" to alter the evidentiary landscape holds equally true in more complex cases. *Amicus* has represented dozens of clients against whom evidence in the trial record appeared massive – until DNA test results proved otherwise, generating a complete paradigm shift. In

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[5] *See* Scheck et. al., ACTUAL INNOCENCE 334-35.

these cases, a single new key fact can radically change the lens through which all of the "overwhelming" trial evidence – and the culpability of the defendant – is viewed.

Kirk Bloodsworth, for example, was convicted and sent to Maryland's death row for the rape-murder of an eight-year-old girl in 1985. Five separate eyewitnesses testified that Bloodsworth was the man seen with the victim just prior to her death. Were that not enough, the jury also heard that (a) a shoeprint near the body was the same size as Bloodworth's own; and (b) while being interrogated, he had revealed knowledge of a "bloody rock" at the crime scene – a detail then known only to police. Indeed, prosecutors were so convinced of Bloodsworth's guilt that even after DNA tests excluded him as the source of semen on the girl's underwear in 1992, they only conceded they were bound to reverse his conviction, but did not concede his innocence. It was not until ten years later, when DNA yielded a databank "hit" on the real killer – a convicted pedophile – that they did so, and belatedly apologized to Bloodsworth. By then, the evidentiary house of cards had truly fallen apart – revealing that the eyewitnesses (including heavily-coached children) were all mistaken; the same-sized shoeprint near the body a mere coincidence; and Bloodworth's "knowledge" of the bloody rock a fabrication by the police.[6]

A similarly "overwhelming" evidentiary record marked the 1988 trials of ***Ron Williamson and Dennis Fritz*** in Oklahoma, before DNA testing conducted on semen and hair evidence from the rape/murder victim exonerated them in 1999. Jurors had convicted both men, sentencing Williamson to death, after hearing the account of a man named Glenn Gore that he saw Williamson at the victim's workplace just before her murder; the testimony of three fellow inmates that

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[6] Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Nat'l Instit. Just., U.S. Dept. Just., NCJ161258 (June 1996) at 36; "In Same Case, DNA Clears Convict and Finds Suspect," NEW YORK TIMES, Sept. 6, 2003

the men had made admissions to the murder; that the victim had told a friend that the men "made her nervous"; and statements Williamson made in custody about a vivid "dream" of the crime. The state's experts also claimed that a total of 17 hairs from the crime scene "matched" Fritz or Williamson, and that both men were possible contributors of sperm inside the victim. Yet the same DNA tests that later excluded the men from this forensic evidence also provided a DNA link to the true perpetrator – the state's informant, Glenn Gore – thus exposing him and the other "snitches" as liars, and the statements the defendants allegedly made about the crime to be innocuous or invented.[7]

Former death row inmate ***Ray Krone*** of Arizona was the victim of another junk science, dubbed "forensic odontology," in which a defendant's dental impressions are "matched" to the bite marks left on a victim. Called "the snaggletooth killer" when convicted of the murder of a waitress whose killer bit her breast, he was exonerated by DNA testing a decade later that excluded him from the bite mark's saliva stains (and which, as in the Bloodsworth case, was matched to the DNA of a convicted sex offender).[8]

With good reason, then, the "ripple effect" of new evidence of innocence was not lost on the *Schlup* court. *See id.* at 330 (noting that, "under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial.") Yet the *en banc* majority in *House* failed to grasp this principle. By holding that Petitioner must "do more" than merely "raise questions about the reliability of portions of the trial testimony or the manner in which physical evidence was handled or analyzed," *House v. Bell*, 386 F.3d 668, 685 (6th Cir. 2004)(emphasis supplied), the court improperly

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[7] *See* "DNA Tests Clear Two Men in Prison," DAILY OKLAHOMAN, April 16, 1999; Scheck et. al., ACTUAL INNOCENCE 163-202

[8] *See* "DNA Frees Arizona Inmate after 10 Years in Prison," ARIZONA REPUBLIC, April 9, 2002.

viewed the new evidence in isolation – and denied the Petitioner the powerful inferences to which he was entitled.

For this case is one in which DNA and other advanced forensic evidence does more than just "raise questions" about "portions" of the trial evidence. It directly proves the falsity of key "facts" presented to the convicting jury, and its impact reverberates throughout the trial record. Most critically, by definitively proving that Petitioner was not the source of the semen stains on the underwear and nightgown worn by the victim, the DNA test results eviscerate the entire motive for the crime and theory of guilt upon which the prosecution asked the jury to convict (*i.e.*, that he lured Mrs. Muncey to a secluded area for purposes of sexually assaulting her, then killed her when she "resisted" him).[9] Similarly, the State Medical Examiner's new analysis of the enzyme degradation on Petitioner's blood-stained blue jeans, coupled with the evidence of blood spillage from the autopsy test tubes, does far more than just show that this blood could not have come from the victim's veins at the time of her murder. For if Mrs. Muncey's blood was not on Petitioner's jeans the night she was killed, and Petitioner's semen was not on her clothing, the value of the stains as "corroboration" for the eyewitness who claimed to have seen him at the crime scene is eliminated. And with both of these forensic "facts" no longer part of the trial record, a reasonable jury would be far more likely to credit Petitioner's innocent explanation for how he incurred his minor injuries that night – not to mention the overwhelming new evidence inculpating the victim's husband (including Mr. Muncey's motive, attempts to fabricate an alibi, and credible confessions to two members of the community).

Simply put, it is impossible for a reviewing court to

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[9] Indeed, the State told the court at the commencement of sentencing that "the fact that there was semen on the outer garment, that is, the nightgown" was its basis for seeking death, as it would support a finding that Petitioner murdered the victim "in the process of either rape or attempted rape." *House*, 386 F.3d at 693.

correctly make "a probabilistic determination about what reasonable, properly instructed jurors would do" (*Schlup*, 513 U.S. at 329) if it does not consider the potentially far-reaching impact of the new evidence on the old. This case provides an ideal vehicle for this Court to so instruct the Circuits, and avoid future error in this small but critical class of cases. *See id.* at 324-25 ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent.")(internal citations omitted).

C. On "Finality": Memories Fade, but DNA Does Not

The *Schlup* court acknowledged a "threat to finality" inherent in any rule that facilitates habeas relief. *Id.* at 326. And among the chief stumbling blocks before the petitioner in *Herrera* was the Court's view that post-conviction factfinding was, by its very nature, less accurate than the original trial. *See* 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications").

However true this maxim may have been in 1993, it is hardly so in the DNA era. Indeed, it is precisely because DNA test results are more objective, discriminating, and accurate than lay evidence – even decades after the crime – that access to post-conviction DNA testing has expressly overridden the ordinary rules of "finality" at both the state and federal level. As noted by D.O.J.'s National Commission on the Future of DNA Evidence:

> The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. . . . The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post-conviction relief, has been weakened by the growing number of convictions that have been

vacated by exclusionary DNA test results.

POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, Nat'l Instit. Just., U.S. Dept. Just., NCJ 177626 (Sept. 1999).

Scientific proof exposing "false facts" in a trial record is thus analytically distinct from virtually all other forms of post-conviction claims. In such cases, a court need not choose between fact-finding accuracy and due process, as both interests may be served by passage through *Schlup*'s gateway. The erasure of that dichotomy in this distinct class of cases should, in turn, send a clear message to lower courts that such evidence is entitled to substantial weight in determining what the verdict of "reasonable jurors," fully armed with this irrefutable science, would be.

That a retrial in Petitioner's case would now provide jurors with more objective and reliable forensic evidence cannot seriously be disputed. The principal reason, of course, is the newly proven "false fact" from the 1986 trial regarding the semen stains that would no longer taint those deliberations. The original jury was told by an FBI analyst that Petitioner (but not the victim's husband) was "definitely" among the small minority of men who shared both the blood type and secretor status of the semen donor, and thus could well have been its source. But as the *House* majority conceded, DNA has now proven – to an absolute scientific certainty – that neither stain came from Petitioner, and that both stains in fact came from the victim's husband, whom Petitioner has long contended was the real killer. *See House*, 386 F.3d at 687. Similarly, the majority's concession that Petitioner "succeeded in showing . . . that, at some point, the blood evidence appears to have been mishandled, resulting in spillage," *id.*, vastly understates the power of the new evidence, as well as the impact the original (false) blood evidence surely had on the jury's deliberations.

The uniquely probative and "timeless" nature of such

proof makes it imperative that this Court correct the *House* majority's failure to give it due significance under *Schlup*. For in future cases, no matter how powerful the DNA or other forensic proof, there will invariably be some "old evidence" left standing from the trial (whether the specious claim of a jailhouse snitch, or the honest but mistaken recollection of a purported eyewitness). Yet the *House* approach, if unchecked, could well erect an insurmountable bar to relief in future meritorious cases, whenever a prosecutor unreasonably chooses to contest a defendant's claim of innocence – no matter how weak the evidentiary "straws" that remain within the State's grasp may be.

II. This Court Must Ensure a Meaningful Federal Safeguard Against Wrongful Imprisonment and Execution for the Small but Critical Minority of Innocent Persons With Exculpatory DNA or Equally Compelling Post-Conviction Evidence, but to Whom Prosecutors and State Courts Unreasonably Deny Relief

Despite the revolutionary impact of DNA technology on the justice system in recent years, the pages of the Federal Reporter are not replete with exoneration case law. The reason is that this technology has so quickly gained acceptance among State officials – who recognize its power both to identify the guilty and exonerate the innocent – that most claims for post-conviction relief based on DNA evidence never reach the federal *habeas* courts, because relief is granted at the state level. Indeed, in the overwhelming majority of such cases handled by *amicus* and our colleagues to date, the defendants' exonerations have transpired on the full consent of the prosecution. There are also a small minority of cases in which the underlying conviction is vacated on consent, but the prosecution reserves the right to conduct a retrial – as, of course, the

State would be free to do here.[10] But *amicus* knows of no case to date with a result like *House*, in which both prosecutors and courts have failed to grant so much as a new trial despite the presence of (a) DNA and other new forensic evidence that proves the falsity of key "facts" heard by the jury at trial, and (b) a broad array of testimonial proof regarding an alternate suspect's motive, fabricated alibi, and contemporaneous confessions.

It becomes even clearer that the *House* majority stands as an "outlier" among its peers when the case is compared to analogous appellate rulings in both state and federal courts. State courts, for example, have properly granted new trials based on other newly discovered forensic evidence – even where the science at issue is far less advanced and persuasive to juries than DNA. *See, e.g., Alabama v. Banks*, 845 So.2d 9 (Ala.2002) (reversing conviction for murder of wife's newborn baby, based on new evidence that a prior tubal ligation likely precluded the alleged pregnancy, contradicting medical evidence at trial); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint, alleged at trial to have been defendant's, which upon closer review excludes him); *People v. Jackson*, 283 N.W.2d 648 (Mich. App. 1979) (new evidence that semen on victim's underwear is from non-secretor, while defendant was a secretor, would "render a different result probable on retrial"); *see also State v. Pope*, 80 P.2d 1232 (Mont. 2003) (in two-perpetrator, two-victim rape case, DNA excluding Pope, but including co-defendant,

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[10] For recent examples, *see, e.g., Brewer v. State*, 819 So.2d 1169 (Miss. 2002) (remanding for evidentiary hearing on new trial for death row inmate Kennedy Brewer, convicted of strangulation of child, after DNA excluded him from semen on girl's body) *and* "DNA Wins Inmate New Trial," The Clarion-Ledger, Sept. 6, 2002 (reporting prosecutor's subsequent consent to vacate Brewer's conviction, remarking, "If you follow the law on newly discovered evidence, [the DNA] would be possibly something that would change the jury's verdict"); "DA Says Inmate Should be Freed," Houston Chronicle, Oct. 1, 2004 (consenting to vacate rape conviction of George Rodriguez, who served 18 years in prison, after DNA excluded him from pubic hairs and invalidated serologist's trial testimony).

warranted vacatur); *People v. Waters*, 328 Ill.App.3d 117 (2002) (same, in three-perpetrator rape case, where defendant was alleged to have urinated on victim, yet DNA excluded him as source of urine).

Similarly, in those rare cases when convicted persons with new, exculpatory DNA test results have been required to pass through *Schlup*'s gateway to obtain relief, the district courts have largely concurred. *See, e.g., Watkins v. Miller*, 92 F.Supp.2d 824 (D.Ind. 2000) (granting writ to defendant convicted of rape/murder, as DNA excluded him from semen in victim's body; although state contended that reasonable jury could still convict based on defendant's confession to jailhouse informant, under theory that he committed murder with another man, court noted that DNA "changes the picture completely" and "conclusively disproves the only theory the state presented at trial"); *Nickerson v. Roe*, 260 F.Supp.2d 875 (D.Cal. 2003) (DNA from robbery-murder crime scene blood excluded defendant and inculpated co-defendant; while two eyewitnesses identified defendant, co-defendants swore he did not participate in crime).

But make no mistake: the fact that the State's refusal to grant Mr. House a new trial is patently unreasonable, and the *en banc* court's reasoning outside the norm, does not mean that the opinion will not have devastating and far-reaching implications if allowed to stand. Indeed, a number of *amicus*' clients wrongfully convicted of capital murder would not be free men today had the Sixth Circuit's tortured reading of *Schlup* governed their cases. Moreover, as has recently been noted, "pockets of resistance" are emerging among a small minority of prosecutors' offices, as they begin to steadfastly resist requests for DNA testing (even where it can unquestionably establish innocence or confirm guilt), or try to erect new procedural barriers to hearings on the significance of exculpatory DNA results.[11] While such

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[11] *See* "Prosecutors Fight DNA Use for Exoneration," THE NEW YORK TIMES,

efforts have been widely deplored by commentators and other law enforcement officials,[12] the *Schlup* gateway remains a crucial safeguard for that small – but undeniably critical – minority of innocent persons for whom state court processes fail to provide relief. This may be particularly so given that *Schlup*-eligible cases involve claims of constitutional error at trial, thus providing an incentive for some state actors to block the "gateway," *i.e.*, to prevent claims of egregious misconduct from being adjudicated on their merits (not to mention the risk of subsequent civil actions if serious constitutional violations are established).

The legal issues posed by this finite class of "false fact" cases are undeniably timely ones for review. By clarifying the application of a vital legal rule in a doctrinally distinct evidentiary context – one that was barely on the horizon when *Schlup* was originally decided – this Court can reaffirm our Constitution's venerable tradition of protecting the innocent, without fear of opening the floodgates to large numbers of such claims. And it is hard to imagine a class of *habeas* petitioners more deserving of this crucial safeguard.

III. Evidence of Fraud and Fabrication of Evidence by the State's Serology Expert at Trial, Recently Discovered by *Amicus*, Gives Additional Weight to Petitioner's Constitutional Claims – and New Urgency to His Petition for Certiorari

Most "false fact" cases in the DNA context are the result

Aug. 23, 2003; Carl Hiaasen, "Still Behind Bars, Despite DNA Evidence," THE MIAMI HERALD, May 9, 2004 (quoting State's assertion, in appellate argument, that even if it knew that defendant was "absolutely innocent," he would be entitled to no relief).

[12] *See, e.g.*, William Sessions, "DNA Tests Can Free the Innocent. How Can We Ignore That?" Washington Post, Sept. 21, 2003; "State Fought to Keep Innocent Man in Prison," MIAMI HERALD, Aug. 15, 2004; "Innocence Lost" (editorial), ST. PETERSBURG TIMES, Aug. 22, 2004 ("When prosecutors are uninterested in evidence of a defendant's innocence, they have lost their professional way. They should not only lose their jobs but their license to practice law").

of advancements in forensic science, not a revelation of bad faith on the part of the original crime lab analyst. That is, the original "fact" presented to the jury was supported by laboratory work which, even if rudimentary, was valid at the time of trial – *i.e.*, testing which showed that the defendant's blood type matched the one detected in the crime scene evidence, and thus the jury was (appropriately) informed that he was a potential donor. The "falsity" is established when new, and infinitely more precise, DNA technology proves that he could not, in fact, have been the source – often radically transforming the evidentiary picture upon which the original jury ruled, and thus requiring a new trial, but not impugning the lab work of the original analyst.

This case, however, appears to be far worse. For when *amicus* reviewed the record to assess the significance of the new scientific evidence, we discovered that the FBI serologist who analyzed the stains on the victim's underwear and nightgown, and compared them to the defendant's own blood type, appears to have wholly misrepresented the results of the original tests to the jury on both items.

The State's expert testified, quite properly, that under the ABO blood group system, the 80% of the population who are "secretors" (that is, whose blood antigens are detectible in their other bodily fluids) secrete "H" antigens; persons who are Types "A," "B," or "AB" will, *in addition*, secrete the A and/or B antigens, respectively. The defendant, he found, was an "A secretor." Yet he also reported that the victim's stained underwear (which consisted of semen mixed with the victim's vaginal secretions) had yielded only "H" antigens. The combined test results, then, clearly posed a problem for the State, if it wished the jury to find that Mr. House was a potential donor, since there were no "A" antigens detected in that stain, thus excluding him as the source. Here is how the State resolved that problem at trial:

Q: Can you tell us whether or not the A substance

could have been there, prior to you doing the testing?

A: It could have, yes.

Q: Does the age of the stain make a difference as to whether you find both of these substances?

A: The age of the stain does to some extent make a difference. The environment in which the stain remained after it was deposited could also make a difference. The H blood group substance is the precursor to the B and A blood group substances, chemically, and it can also be degraded from the A or the B to the H.

Q: Which means that the H lasts longer, so to speak?

A: In certain cases, yes.

Q: So, A could deteriorate into H?

A: Yes.

(TT. 901) (emphasis supplied).

This is sheer nonsense. For while it is true that age and environment can cause bodily fluids to degrade to the point where no blood group antigens can be detected, the selective degradation of only certain antigens described above (a/k/a the conveniently "Vanishing A") is simply unheard of in the field of serology.[13] And it is certainly a rule that any remotely competent serologist employed by the FBI in 1986 would have known. If the FBI's typing of the stain was accurate, the jury should have been told 20 years ago that Paul House, as an "A" secretor, was excluded as the source of the stain. The only explanation for this "Vanishing A" theory is that it was fabricated to conform with the State's case against Paul House, *i.e.*, to fraudulently misrepresent the results to make him a potential donor of that semen stain.

And there is more. The FBI reportedly detected both

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[13] Indeed, if antigens could selectively "vanish," then serology would never have been a reliable method for drawing inculpatory or exculpatory inferences from the antigens' presence or absence in a piece of evidence.

"A" and "H" antigens on the semen-stained nightgown. From this, the analyst found that "the person who deposited that semen was blood type A." (T.899). This, too, is wrong. For the analyst ignored a fundamental rule of serology called "masking" (*i.e.*, that in a mixed male-female stain, the greater proportion of cells from the female donor could "mask," and make undetectable, the male's ABO antigens).[14] Here, because the victim herself was presumptively a Type A secretor, any serologist would have to assume masking occurred – meaning that donor need not be an "A secretor" like Paul House, but could have been any man on the planet.

We raise these troubling discoveries not to ask the Court to directly review (or summarily grant) the *Brady* and *Strickland* claims pled by Petitioner in the District Court. But they do provide powerful evidence that the *Schlup* gateway is essential here, to ensure these claims get a full and fair hearing in that forum before Petitioner is executed. And these new facts would likely entitle him to the far more generous standard of review afforded to Petitioners who prove deliberate fabrication of evidence by the State and its agents. *See, e.g., Augurs*, 427 U.S at 103. Surely, coupled with Petitioner's powerful claim of actual innocence – so strong that six Circuit Judges would have freed him from custody without delay, and a seventh would have granted the writ and ordered retrial – one cannot have the remotest "confidence in the outcome" of this deeply flawed trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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[14] See, e.g., U.S. Dep't of Justice, "Proceedings of Forensic Science Symposium on the Analysis of Sexual Assault Evidence," Lib. Cong. Cat. No. 84-601146 (July 8, 1983) (reporting standards promulgated at FBI-sponsored symposium, by scientists from 125 laboratories to establish parameters analysis of sexual assault evidence; participants noted that in mixed samples, when all markers can be attributed to victim, the analyst may not opine as to source of semen).

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In The
Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

I. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

II. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficiently to warrant freestanding habeas relief?

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JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 2004. No further rehearing was sought. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 5, 2005. The petition was filed on March 3, 2005. Certiorari was granted on June 28, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which respectively provide that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. § 2254d(1), which provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ."

STATEMENT OF THE CASE

A Tennessee jury convicted Paul House of first-degree murder after the prosecution urged jurors to conclude from circumstantial evidence that he had abducted, attempted to rape, and murdered the victim. In federal habeas corpus proceedings below, House presented new evidence, including objective scientific evidence, which proved that the key evidence adduced by the prosecution at trial to link him to the crime was either false or unreliable. He also presented credible new evidence demonstrating that the victim's husband was probably the killer. The significance of this new evidence sharply divided the lower federal courts on two questions: (1) whether the new evidence was sufficient under *Schlup v. Delo*, 513 U.S. 298 (1995), to permit adjudication of his defaulted ineffective-assistance-of-counsel claim, and (2) whether it established his actual innocence under *Herrera v. Collins*, 506 U.S. 390 (1993). The district court and a bare majority of the *en banc* court of appeals dismissed House's petition even though all the judges agreed that his new evidence presented a colorable showing of innocence. Seven dissenters in the court of appeals determined that he had clearly met the *Schlup* standard, and six of them found that he had shown his actual innocence of the crime. *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (*en banc*). The record shows the following:

A. State Trial Court Proceedings

1. The Crime

This case arises from Union County, Tennessee, a rural county north of Knoxville. In July 1985, Carolyn Muncey, the victim, resided on Ridgecrest Road with her husband Hubert Muncey, Jr., and their two minor

children.[1] It was well-known that Hubert Muncey, Jr., was an alcoholic, that the Munceys had marital difficulties, and that Hubert had been abusive toward Carolyn. J.A. 229; J.A. 234; J.A. 237. Paul House had recently moved to Union County to be near his mother. When Hubert Muncey, Jr., reported to authorities that he had come home from a dance in the early morning hours of July 14, 1985, to find that his wife was not home with the children, local law enforcement and the community came together to search for her. Almost immediately after Carolyn Muncey's badly beaten body was found the next afternoon at the base of an embankment near a roadway where Paul House had been seen earlier, House became the sole suspect in her murder. His motive, it was supposed, was rape.

2. Trial Proceedings

House was tried in Union County in February 1986, after a change of venue motion was denied. The evidence showed that Ms. Muncey left her home sometime prior to 11:00 p.m. on July 13 and was not seen again until her fully clothed body was found the next day. Both the coroner and the state pathologist determined she died between 9:00 and 11:00 on July 13. J.A. 76. Lacking either a confession or an eyewitness, the prosecutors sought to show, entirely by circumstantial evidence, that House tricked Carolyn Muncey out of her home and killed her when she resisted his sexual advances. The defense asserted that House was innocent, that he had no motive to harm Ms. Muncey, and that the evidence failed to show his guilt beyond a reasonable doubt.

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[1] Hubert Muncey, Jr., was widely known in the community as "Little Hube" and his family called him "Bubba" and "Bubbie."